United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

91

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23875

UNITED STATES,
Appellee

-v.-

MANUEL R. SAMBRO,
Appellant

BRIEF FOR APPELLANT

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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CASES

STATUTES AND OTHER AUTHORITIES

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STATEMENT OF ISSUES

WHETHER DEFENDANT WHO WITHDREW NOT-GUILTY PLEA AND PLEADED GUILTY SHOULD BE ALLOWED TO WITHDRAW GUILTY PLEA BEFORE SENTENCING.

This case has never been before this Court under a same or similar title.

REFERENCE TO RULINGS

Reference is made to the November 25, 1969 ruling of the Honourable June Green denying Defendant's motion to withdraw his guilty plea before sentencing.

STATEMENT OF THE CASE

This is an appeal from a ruling of the Honourable Judge June Green of the United States District Court for the District of Columbia. Judge Green denied the motion of the Defendant below, Manuel R. Sambro, to withdraw his plea of guilty. The Defendant was indicted on March 4, 1969 in the case numbered Criminal No. 328-69, for violation of 26 USC 4742(a), 4744(a), 4702(a), 4704(a) and 21 USC 174, statutes pertaining to narcotics. On March 21, 1969, Defendant was arraigned and pleaded not guilty. On October 1, 1969, Defendant withdrew his plea of not guilty and pleaded guilty to Count No. 11, a violation of 26 USC 4704(a). (Appendix Page 2). Defendant, an alien, who has great difficulty understanding English and who failed to understand the nature and significance of his

plea and the penalty, through his Counsel, moved to withdraw his guilty plea. (Appendix Pages 2-5). Judge Green denied Defendant's motion, sentenced him, and suspended the imposition of sentence, placing him on probation for four years. Notice of Appeal was timely filed on December 5, 1969.

ARGUMENT

Defendant should be allowed to withdraw a plea of guilty before sentencing.

Rule 32(d) of the Federal Rules of Criminal Procedure states:

> A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended.

The test for the trial court is "fairness and justice". Kencheval v. United States 274 U.S. 220, 224, 47 S.Ct. 582, 583, 71 L.Ed. 1009 (1927). See also Everett v. U.S. 119 U.S. App.D.C. 60, 336 F.2d 979 (1964); U.S. v. Bishop 121 U.S. App.D.C. 243, 349 F.2d 220 (1965); U.S. v. Stayton 408 F.2d 559 (CA3-1969); U.S. v. Roger 289 F.Supp. 726 (D.Conn.-1968).

In U.S. v. Davis 212 F.2d 264 (CA7-1954), the Seventh Circuit Court of Appeals considered mistake or misapprehension on the part of the accused as reason enough for permitting withdrawal of a plea of guilty.

In Poole v. U.S. 102 U.S. App.D.C. 71, 250 F.2d 396, 400 (1957), the Court stated:

> Leave to withdraw a guilty plea prior to sentencing should be freely allowed.

Here the Defendant, who does not speak or understand English well, failed to understand his Counsel's explanation of the significance of his plea. Also, the Government would not be prejudiced if the Defendant were tried on the merits. The transcript (Appendix Page 2) reveals

the Defendant had assisted the Metropolitan Police Department narcotics squad and the Office of the U.S. Attorney for the District of Columbia. He, no doubt, did this for a reason, regardless of the Government's protestations. (Appendix Pages 3,4). After a period of confusion and after his plea of guilty on October 1, 1969, Defendant, before sentencing, withdrew his plea of guilty and demanded a trial by jury. Defendant should be allowed to withdraw his guilty plea and be tried on the merits by a jury.

CONCLUSION

The denial of Defendant's pre-sentence motion to withdraw his guilty plea should be reversed.

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CERTIFICATE OF SERVICE

I certify that I served one copy of the attached brief upon the United States Attorney for the District of Columbia, U.S. Courthouse, Washington, D.C., on the 22nd day of June, 1970.

John Joseph Matonis

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,875

UNITED STATES OF AMERICA, APPELLEE

v.

MANUEL R. SAMBRO, APPELLANT

Appeal from the United States District Court for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
PHILIP L. COHAN,
Assistant United States Attorneys.

Cr. No. 828-69

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ISSUE PRESENTED *

Whether the trial court abused its discretion in denying appellant's motion to withdraw his plea of guilty.

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,875

UNITED STATES OF AMERICA, APPELLEE

v.

MANUEL R. SAMBRO, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a twelve-count indictment filed March 4, 1969, appellant was charged with narcotics and marijuana violations under 21 U.S.C. § 174 and 26 U.S.C. §§ 4704(a), 4705(a), 4742(a) and 4744(a). Appellant was arraigned on these charges on March 21, 1969, and pleaded not guilty to all counts. On October 1, 1969, before the Honorable June L. Green, appellant withdrew his plea of not guilty as to Count 11 (an alleged violation of 26 U.S.C. § 4704(a)) and entered a plea of guilty to that count. On November 25, 1969, appellant appeared before Judge Green for sentencing and at that time moved to with-

draw his plea of guilty. Following a hearing, appellant's motion was denied. The Court then suspended the imposition of sentence and placed appellant on probation for a period of four years. This appeal followed.

ARGUMENT

Following full compliance with Rule 11 and full consideration of appellant's motion to withdraw his plea of guilty, the trial court did not abuse its discretion by denying that motion.

(Tr. I, 3-8; Tr. II, 4)

Appellant's brief cites only two grounds in support of his motion to withdraw his guilty plea: (1) a poor understanding of English and (2) a mistaken belief that his plea would not subject him to deportation.

At the time of his plea, appellant was extensively interrogated by the trial court in compliance with Rule 11, FED.R. CRIM. P., and the Resolution of the Judges of the U.S. District Court for the District of Columbia promulgated June 24, 1959. The court's inquiries were addressed to appellant personally[1] and were unequivocally directed toward establishing (1) that there existed a factual basis for the plea; (2) that appellant understood the nature of the charges; (3) that appellant understood the consequences of his plea; (4) that the plea was entered with the advice of counsel; and (5) that the plea was entered voluntarily (Tr. I, 3-8).[2] Appellant does not contend that he failed to understand these inquiries from the court.[3]

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[1] See *McCarthy* v. *United States*, 394 U.S. 459 (1969).

[2] "Tr. I" refers to the transcript of the guilty plea entered on October 1, 1969, and "Tr. II" refers to the transcript of the hearing on appellant's motion to withdraw the plea on November 25, 1969.

[3] Interestingly, appellant contends that because of his "great difficulty understanding English . . . [he] failed to understand the nature and significance of his plea and the penalty" (Br. 2-3, 4), but he does not claim that he failed to understand the trial court's several questions.

Notwithstanding that "fairness and justice" [4] is the applicable test for determining whether a guilty plea should be permitted to be withdrawn and that a "guilty plea prior to sentencing should be freely allowed," [5] appellant has no absolute right to withdraw his plea:

> Overwhelming authority holds, as has this court, that withdrawal of a guilty plea before sentencing is not an absolute right but a decision within the sound discretion of the trial court which will be reversed by an appellate court only for an abuse of that discretion.[6]

Appellee submits that the record fails to disclose any abuse of discretion [7] by the trial court. With respect to appellant's contention that his poor understanding of English precluded him from understanding the nature and consequence of his plea, there simply is nothing in the record upon which to base this claim. In fact, appellant's responsive answers to the court's interrogatories suggest a contrary conclusion (Tr. I, 5-6). Appellant's counsel expressed no difficulty in communicating with appellant at the time of the plea, and the court noted no difficulty. Accordingly, appellee submits that this Court is presented with a record totally void of any substantiation for appellant's contention.

Appellant's second argument is that his plea was involuntary, having been entered without a full under-

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[4] *Kercheval* v. *United States*, 274 U.S. 220 (1927).

[5] *Poole* v. *United States*, 102 U.S. App. D.C. 71, 75, 250 F.2d 396, 400 (1957), in which, however, the Court relied in large part on the fact that the appellant was unrepresented by counsel at the time of his plea. See *Gearhart* v. *United States*, 106 U.S. App. D.C. 270, 273, 272 F.2d 499, 502 (1959).

[6] *Everett* v. *United States*, 119 U.S. App. D.C. 60, 64, 336 F.2d 979, 983 (1964).

[7] Abuse of discretion has been defined by this Court as "action which is arbitrary, fanciful, or clearly unreasonable." *United States* v. *McWilliams*, 82 U.S. App. D.C. 259, 261, 163 F.2d 695, 697 (1947).

standing of its consequences. The particular consequence of which appellant and his counsel expressed ignorance[8] is the provision of 8 U.S.C. § 1251 (a) (11) under which appellant's conviction for a narcotic drug offense makes him deportable. This issue, in somewhat the converse, was previously before this Court in *Briscoe* v. *United States*, 129 U.S. App. D.C. 146, 391 F.2d 984 (1968), where it was said:

> We do not accept appellant's contention that his guilty plea must be set aside as involuntary because it was induced by his misunderstanding, *in that he thought he was in fact to be deported.* 129 U.S. App. D.C. at 148, 391 F.2d at 986 (emphasis added).

In *United States* v. *Parrino*, 212 F.2d 919 (2d Cir. 1954) this issue was presented in the precise form in which it is raised here. In affirming the denial of Parrino's motion to withdraw his plea, the Court stated:

> Generally in criminal cases, the defendant's surprise as to the severity of sentence imposed after a plea of guilty, standing alone, is not such manifest injustice as to require vacation of the judgment and permission to withdraw a plea of guilty. True, when surprise stems from a misunderstanding, reasonably entertained, or remarks by the Judge himself . . . or from assurances by the United States Attorney, it may be ground for post-conviction relief. But surprise, as in the instant case, which results from erroneous information received from the defendant's own attorney, at least without a clear showing of unprofessional conduct, is not enough.
>
> Moreover, here the subject matter of the claimed surprise was not the severity of the sentence directly

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[8] Appellant is apparently not claiming ineffective assistance of counsel, which in any event would require significantly more than the mere assertion of his counsel's mistaken understanding of the immigration laws. *Smith* v. *United States*, 116 U.S. App. D.C. 404, 408-409, 324 F.2d 436, 439-440 (1963), *cert. denied*, 376 U.S. 957 (1964); see *Bruce* v. *United States*, 126 U.S. App. D.C. 336, 379 F.2d 113 (1967); *cf. United States* v. *Hammonds*, —— U.S. App. D.C. ——, 425 F.2d 597 (1970).

> flowing from the judgment but a collateral consequence thereof, namely deportability. . . . It is true . . . that a defendant should not be holden to a plea of guilty made without an understanding of the consequences. [But this does not mean] . . . that the finality of a conviction on a plea of guilty depend[s] upon a contemporaneous realization by the defendant of the collateral consequences thereof. . . . And research of our own fails to disclose a case even intimating a rule of such breadth. . . .
>
> We find no case which even looks in that direction, and the absence of cases expressly rejecting such doctrine we attribute to the absence of a rule so palpably unsound. 212 F.2d at 921-22 (citations and footnotes omitted).

Appellee, of course, acknowledges that both *Briscoe* and *Parrino* involved post-sentence motions to withdraw guilty pleas and are thus subject to the "manifest injustice" standard of Rule 32(d), FED. R. CRIM. P. However, neither the *Briscoe* nor the *Parrino* decision is premised upon the distinction between pre-sentence and post-sentence motions to withdraw guilty pleas, but rather, those decisions stand for the proposition that such a misunderstanding, as to a completely collateral question, has no relevance to the voluntariness of the plea and therefore does not constitute *any* basis for permitting withdrawal of that plea.

Appellee is somewhat at a loss as to how to respond, if at all, to appellant's reference in his brief to his cooperation ~~wiwth~~ with the Narcotics Squad of the Metropolitan Police Department (Br. 5). His brief suggests that there was a reason for this cooperation but fails to give it. Absent some specific contention, appellee declines to speculate as to what appellant means. However, we do point out that cooperation alone does not support a claim that the plea was not voluntarily made. *United States* v. *Hughes*, 325 F. 2d 789 (2d Cir. 1964), cited in *Everett* v. *United States*, *supra*.

Appellee also feels compelled to respond briefly to appellant's assertion at the time of the hearing on his mo-

tion that he would offer a defense of entrapment,[9] thus suggesting that his prior admissions of guilt were not inconsistent with his motion to withdraw. Appellee respectfully disagrees with appellant's evaluation of what testimony would be consistent with the truth. Apparently his contention here is that a failure to state the truth fully is not as reprehensible as an overt misstatement. The fact of the matter is that appellant in recounting his perpetration of the offense did not allege that his criminal acts were occasioned by police inducement. Furthermore, we must assume that he made no such allegation to his attorney in the course of being counseled as to his plea. Such being the state of the record, the trial court could quite properly dismiss this proffered defense[10] as being not probative of appellant's state of mind when he entered his plea and thus not relevant to whether the plea was voluntarily entered with a full understanding of the nature of the charges and the consequences of his plea. *High* v. *United States*, 110 U.S. App. D.C .25, 28, 288 F.2d 427, 430, *cert. denied*, 366 U.S. 923 (1961). See also *United States* v. *Hughes*, *supra*, 325 F.2d at 791, and *Rachel* v. *United States*, 61 F.2d 360, 362 (8th Cir. 1932), both cited in *Everett* v. *United States*, *supra*.

High,[11] *Hughes* and *Rachel* are not distinguishable by reason of the fact that in each of those cases the appellant's motion was made after sentencing. Although appellant here had not been sentenced at the time of his motion, he had discovered that his plea would subject him to deportation. Accordingly, the practical conse-

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[9] This claim has not been re-asserted on appeal and is, therefore, apparently abandoned, perhaps in response to the prosecutor's representation that appellant's only cooperation with the Narcotics Squad occurred after his arrest for the offenses charged (Tr. II, 4).

[10] *United States* v. *Brown*, D.C. Cir. Nos. 23,367 and 23,372, decided July 13, 1970 (unreported).

[11] The decision in *High*, *supra*, was expressly held to be equally applicable to a pre-sentence motion. 110 U.S. App. D.C. at 28, 288 F.2d at 430.

quences of that knowledge, appellee submits, is identical to the consequences of the sentences in *High*, *Hughes* and *Rachel*. In other words, the motivation for moving to withdraw the plea after sentencing was equally present in the instant case after appellant learned of his eligibility for deportation.

In arguing that appellant's alleged potential defense of entrapment does not necessitate granting of his motion to withdraw, appellee is not unmindful of this Court's "indication" [12] in *Gearhart* v. *United States*, 106 U.S. App. D.C. 270, 272 F.2d 499 (1959), that the trial court "should not attempt to decide the merits of the proffered defense, thus determining the guilt or innocence of the defendant." 106 U.S. App. D.C. at 273, 272 F.2d at 502. However, the *Gearhart* case is distinguishable in that the proffered defense of insanity in that case was not inconsistent with Gearhart's prior admissions of guilt. By contrast, in the instant case, appellant's prior admissions, being less than the whole truth, were inconsistent with his belatedly proffered defense of entrapment.

Accordingly, appellee submits that appellant has failed to establish any abuse of discretion by the trial court in refusing to permit withdrawal of his guilty plea.

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[12] In *High* v. *United States*, *supra*, 110 U.S. App. at 29, 288 F.2d at 431, this Court observed that *Gearhart* "indicates, although it does not hold," that a motion to withdraw a guilty plea because the accused has a defense should be "rather freely granted," but even then the discretion remains with the Court to determine whether or not to permit withdrawal.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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